Postal Regulatory Commission
Submitted 2/26/2020 6:26:02 AM
Filing ID: 112485
Accepted 2/26/2020

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Complaint of the Greeting Card Association	:	Docket No. C2020-2

GREETING CARD ASSOCIATION ANSWER TO PITNEY BOWES MOTION TO DISMISS

In this pleading, the complainant Greeting Card Association (GCA) replies to the motion to dismiss filed on February 19, 2020, by Pitney Bowes, Inc. (PB). The PB motion should be denied, since the complaint raises material issues of law and fact.

The statute governing complaints. Section 3622(b)(1)(A), the Commission may take one of two courses: (i) if it finds that "such complaint raises material issues of fact or law, [it shall] begin proceedings on such complaint" or (ii) it may dismiss the complaint. In either case, the Commission issues a written statement of "the bases of its determination." The Commission's Rules of Practice track these requirements (see especially 39 CFR sec. 3030.30).

GCA is also responding to two other motions to dismiss, filed by the Postal Service and National Postal Policy Council. There is substantial commonality in the issues raised by the three motions, and GCA respectfully requests that the Commission consider responses in this Answer in relation to the other two motions, and conversely, insofar as that is helpful.

Contrary to the assertions of the PB motion, GCA's complaint raises material issues of law and fact.

I. PREVIOUS COMMISSION DETERMINATIONS

PB argues that previous Commission determinations preclude the present complaint. Much of what it says was addressed in the complaint. Here we discuss PB's specific assertions.

Section 403(c). Since the principal basis of the complaint is sec. 403(c), prohibiting undue or unreasonable discrimination, we first take up PB's argument that the Commission has found that the Metered Letter rate does not violate it.[1] The FY 2014 *Annual Compliance Determination Report,* quoted by PB, states that "[t]o conclude that the Postal Service violates 39 U.S.C. § 403(c), the Commission must find that the price discrimination between Stamped and Metered Letters is either 'undue or unreasonable.'"

This is not a finding that the Metered Letter rate does not violate sec. 403(c), but a statement of what must be shown in order to prove such a violation. The Commission, in other words, found that the party raising the discrimination issue (American Postal Workers Union) had not made that showing. Review of APWU's comments in the FY 2014 ACR proceeding shows that they relied principally on the *GameFly* decisions of the Court of Appeals for the District of Columbia Circuit. They did not contain factual showings that the disfavored group could not obtain the lower rate, nor that it was not justified by cost savings, nor that it was not eliciting the mailer behavior it was intended to promote. A finding that a complaining party has not proved its case is not a finding that the rate complained of does not violate that legal standard invoked: it simply leaves the question open. On this point, see the GCA complaint, pp. 5-6.

Thus PB is incorrect in arguing that the ACR2014 decision has foreclosed reliance on sec. 403(c). The question whether the Metered Letter rate violates it remained open after that decision.

[1] PB Motion, p. 5.

Even were that not so, the question takes a different form if the discrimination exceeds the difference in cost-to-serve as between the two groups of customers. The cost and price facts available to (though not discussed in detail by) APWU in the FY 2014 compliance review would not have supported such a conclusion. At that time, the differential had not exceeded $0.01, which was less than the volume variable cost difference as reported by the Postal Service.

Since the differential was raised to $0.03 (Docket R2017-1), it has exceeded cost difference. At its present level of $0.05 it continues to do so. This implies that even if were true that the Commission had found in its FY 2014 ACD that the Metered Letter rate did not violate sec. 403(c), rather than leaving the question open because APWU had not sufficiently made its case, the same conclusion would not be appropriate today. Undue or unreasonable discrimination is a question of fact as well as of law. Whether the facts would support a defense of cost justification when a rate is challenged as unlawfully discriminatory is an important factual issue. GCA has thoroughly developed it (see pp. 17-21 of the complaint, and for current relationships, Table B). Whatever view one takes of the Commission's FY 2014 ACD statement, it cannot be applied mechanically to present-day facts.

Pricing flexibility (objective (b)(4)). PB argues the Commission has held that the Postal Service's ability to exercise pricing flexibility (sec. 3622(b)(4)) justified the Metered Letter differential. This line of argument assumes that a rate justifiable under objective (b)(4) *ipso facto* cannot violate sec. 403(c). GCA's complaint disputes this interpretation. This circumstance at least raises a material issue of law, requiring initiation of proceedings under sec. 3662(b)(1)(A). But PB's argument is in fact mistaken.

GCA's complaint, at pp. 8-10, discusses in detail the way in which sec. 403(c) governs, as against one of the "qualitative"[2] requirements of the statute. We believe that sec. 403(c) shares the overriding nature the Commission ascribed to the workshare

[2] The Commission's term for the sec. 3622 objectives and factors in Docket No. R2009-3, Order No. 536.

discount requirements, the price cap, and the preferred-rate provisions of PAEA.[3] It is a direct command by Congress, and – very significantly – is not part of the system of rate-making the Commission was directed to create by regulation (sec. 3622(a)). It is addressed to the Postal Service, with the Commission having an enforcement role (via complaint or ACR proceedings). Sec. 403(c) makes it clear that the Postal Service may not establish an unduly or unreasonably discriminatory rate; the discretion the Commission may or may not have in applying objective (b)(4) is, in that situation, simply irrelevant.

PB does not argue that the Commission has decided this issue. It is important here because past Commission decisions that accepted the Metered Letter rate as an exercise of pricing flexibility did not take account of the possibility that it violated sec. 403(c) – whether because that issue was not raised, or because it was raised too superficially to permit a supportable decision.[4] Whether that violation is present here, past invocation of objective (b)(4) notwithstanding, is a material issue of law and fact of just the kind sec. 3662(a)(1) calls upon the Commission to entertain.

In this connection, a comment on PB's citation of a footnote in the R2013-10 opinion is in order. PB emphasizes a sentence in which the Commission said there was no "obvious legal barrier" to the Postal Service's using its pricing flexibility to establish a separate Metered Letter rate. (The Commission also stated that the issue had not been explored on that record.) This is not a ruling that the Postal Service has *carte blanche* to set such a rate regardless of any other legal requirement. We doubt that the Commission would have meant that the Service was free to establish a Metered Letter rate which violated sec. 403(c) (or, indeed, some other sec. 3622(b) objective).

II. THE MERITS OF THE COMPLAINT

[3] Docket RM2009-3, Order No. 536, pp. 16 et seq.

[4] If the FY 2014 annual compliance decision *had* decided that issue, and had decided it against the view advanced in GCA's complaint, it presumably would have squarely rejected APWU's undue discrimination claim rather than leaving the question open.

The workshare discount issue. PB points to a conclusion expressed in the R2013-10 opinion that the record did not support a conclusion that the Metered Letter price was a workshare rate. It seems to argue that this negates any issue of whether the differential is cost-justified.

GCA does not argue that the differential is a workshare discount. At pp. 21-22 of the complaint, we agree that it is not, and show that the role of cost justification in an undue discrimination complaint is different from its function in evaluating workshare discounts under sec. 3622(e). The dispute, in other words, is not over whether the Metered Letter differential violates the workshare discount rules but over whether it is unduly and unreasonably discriminatory for several reasons, one of which is that it exceeds the relevant cost difference and thereby forces non-eligible mailers to assume an undue portion of operating costs.

The Metered Letter rate as a promotional price. At pp. 5-6 of the motion, PB cites the FY 2016 ACD for the proposition that the Commission found the Metered Letter rate not to be a promotion. This is relevant because the complaint shows that the volume of metered letters has not significantly increased since the institution of the differential, so that it had not succeeded in what we called its promotional purpose.

The quotations said to support the alleged conclusion of the Commission are in fact from the comments of Stamps.com, as quoted by the Commission, rather than from the Commission's own determination (printed in italics at pp. 75-76 of the ACD). There is no reason to believe that the Commission meant to adopt them, any more than it meant to adopt GCA's comments to the contrary, quoted in the same section of the ACD.

Insofar as PB may be arguing that the Metered Letter rate is not a promotion in the technical sense (the proposition advanced by Stamps.com in the comments just referred to), we do not disagree. We discuss the difference at p. 26 of the complaint. The

fact remains that when the Postal Service introduced the Metered Letter rate in Docket R2013-10, it stated that the new rate was designed to encourage small- and medium-sized businesses to adopt meters in place of stamps.[5] PB agrees that it was, and is, a "pricing incentive" to encourage "small- and medium-sized business mailers" to use meters and other postage-evidencing modes said to be more efficient.[6]

The basis of PB's argument on this subject appears to be that the Metered Letter rate is not a workshare discount, and thus need not be cost-justified. This in turn assumes that no legal or regulatory principle except "the cost-based limitations of section 3622(e)" requires a price differential to be supported by a difference in cost. That is a proposition which GCA, as the complaint and the preceding discussion make clear, does not accept. Lack of justification in terms of cost is a significant element in establishing that a rate is unduly discriminatory. A price differential exceeding the cost difference which supposedly justifies it forces non-eligible customers to bear a larger, and undue, share of operating costs. Relation to cost difference is highly relevant under sec. 403(c), and not solely as it would be in evaluating a workshare discount under the different requirements of sec. 3622(e).

The significance of volume. PB argues[7] that the complaint, by extensively investigating the behavior of metered letter volume, has ignored what it says are the "actual purposes" of the rate: "customer convenience and productivity gains, particularly for small- and medium-sized businesses, operational savings for the Postal Service due to reduced stamp costs, revenue-protection and risk reduction, and increased cross-selling opportunities."

[5] Docket No. R2013-10, *United States Postal Service Notice of Market-Dominant Price Adjustment,* pp. 18 et seq.

[6] PB Motion, p. 7.

[7] Id., pp. 8 et seq.

Some of these would benefit the businesses using the Metered Letter rate[8], and since they are the class favored by the discrimination, their existence would not tend to show that the discrimination was lawful. Benefits to the Postal Service have never been quantified on a public record. Most significantly, however, the natural expectation would be that benefits accruing to the user of the favored rate would elicit more volume or retain volume that might otherwise migrate to non-mail channels.

With respect to the latter possibility, PB selects some years from GCA's comparisons to show that stamped letter volume declined faster than metered volume. But there is no evident reason why volumes for these two sub-types should move in lockstep. The complaint shows that the class of Metered Letter users is substantially identical with the class of business mailers, since metering is for strong practical reasons unavailable to households[9], and thus that the undue discrimination is in favor of business mailers at the expense of households. We should not expect business-origin and household-origin Single-Piece Letters to exhibit the same volume trends.[10]

In the absence of any published data on savings or (the value of) other benefits to the Postal Service, we are left with volume growth, or lack of it, as an indicator of whether the Metered Letter rate has fulfilled expectations. The point of all this is to aid in determining whether the price discrimination is unreasonable. If it has not led to more (high-contribution) Single-Piece Letters with Metered Letter indicia, and if we are not informed about cost advantages to the Postal Service, that determination is all the more necessary.[11]

---

[8] And, significantly, those which were using meters before the Metered Letter rate was established and which did not change their mailing behavior or volumes afterwards. It should be borne in mind that postage meters are, for the mailing industry, a very old technology. See pp. 26-27 of the GCA complaint.
[9] GCA Complaint, pp. 13-17.

[10] See, e.g., the FY 2014 Q2 results in Chart C, p. 24 of the complaint.

[11] In this connection, we would point out that Attachment I to the complaint specifies information on the new and discontinued meter accounts which should be sought in the requested proceeding. This information, which so far as we know is not public, would help show whether or not the "price incentive" has attracted more businesses to use meters.

The revenue issue. At pp. 11 et seq., PB asserts that the existence of the Metered Letter rate does not change the overall amount of revenue collected under the price cap. We agree. PB then goes on:

> . . . GCA's real complaint is that the rate deaveraging within First-Class Mail means that a reduction in the Metered Letters price or Presort prices leads to an offsetting increase in other First-Class Mail rates, namely Stamped Letters. But that complaint serves to confirm that the revenue effect to the Postal Service is neutral, there is no "revenue sacrifice" and, thus, no possible violation of section 3622(b)(5).

So far as the arithmetic is concerned, the first sentence quoted is not wrong. But PB's formulation ignores the strong possibility, explained at pp. 26-27 of the complaint, that business mailers are receiving a five-cent-per-piece reduction for doing just what they were doing before the Metered Letter rate existed. If the establishment of that rate made no measurable difference to their use of First-Class Letter mail, then the dollars devoted to providing them the five-cent differential might better be applied to reducing the markup on Single-Piece Letters (or, perhaps, on First-Class Letters generally).

Presort prices. Though not significantly discussed in PB's motion, the effect of a Metered Letter differential exceeding the cost difference on the Presort rates calculated from it is at least equally important as a revenue issue. All of section III of the complaint discusses this issue. The remedy – given that Single-Piece and Presort mailers are *not* "similarly situated" – is either to return to the original (Order 1320) basis of Presort rate calculation, which is to start from metered letter *cost* and not from an arbitrary Metered Letter rate, or to make the Metered Letter rate non-arbitrary by tying it to actual cost difference. PB ignores this issue.

III. LEGAL ISSUES

Here, PB apparently means to persuade the Commission that the GCA complaint does not raise any issue cognizable under sec. 403(c). This attempt fails.

"Similarly situated". PB and GCA apparently agree that a claim of undue or unreasonable discrimination requires that the two customer groups be "similarly situated." Agreement ends there. PB then alleges that "GCA never expressly explains how the two groups of mailers are similarly situated." This is erroneous.

At pp. 11-13 of the complaint, we list six criteria showing that Metered and Stamped Letters are the same product, differentiated only by indicia. To say that the two groups use the same product is to say that they are similarly situated for purposes of a rate discrimination claim. We expressly demonstrate that the difference in indicia and related processing distinctions do not negate similarity of situation.

PB suggests that the demonstration at pp. 13-17 of the complaint[12] shows that household and business users are not similarly situated. In fact, that demonstration shows that household mailers *cannot,* for strong practical reasons, use meters: that is, that the discrimination between Metered and Stamped Letter prices is in practice a discrimination between businesses and households, to the disadvantage of the latter. That the user groups are distinct and that a member of one cannot practicably abandon it to join the other[13] does not mean that they are not similarly situated with respect to the product for which they pay the differing prices. How, for example, is a householder mailing a $100 telephone bill payment with an adhesive stamp differently situated from a small businessperson mailing a $100 telephone bill payment with a meter strip? PB's argument regarding pp. 13-17 of the complaint amounts to saying that because businesses can use meters and households cannot, they are not similarly situated and there thus cannot be unlawful discrimination as between them, even though both use Single-Piece letter mail, enjoy the same service commitments and privacy benefits, and must observe the same size, weight, and shape limits. Taking GCA's demonstration as established, as in a motion to dismiss it should, PB is effectively saying that businesses and households are not "similarly situated" simply by virtue of being businesses and

[12] PB refers to pages 14-17, but p. 13 is part of the same discussion.

[13] See fn. 24 on p. 13 of the complaint.

households. If that were the law, the mere statement of a cognizable claim of undue discrimination would be self-defeating once the complainant had identified the respective customer groups. If the showing that there are two (or more) distinct customer groups – the first prerequisite for an undue discrimination claim – is also taken to show that the two groups are not similarly situated, then no such claim could survive a motion to dismiss. Sec. 403(c) would become a nullity and the Commission's authority to enforce it would vanish.

Thus PB's argument that GCA has not shown that the user groups are similarly situated is without merit.

"Rational basis." PB argues that because, in its view, the Postal Service advanced a "rational basis" for the Metered Letter in establishing it, it is immune to a complaint of undue discrimination. This line of argument neglects the possibility that a perceived rational basis may turn out to be illusory; and that is (inter alia) what GCA believes has happened in the case of the Metered Letter differential. That a pricing initiative does not produce – or ceases to produce – the effects hoped for does not mean that it must be retained simply because it was rational to try it in the first place.[14] A pricing decision is, or should not be, immutable; if, as has happened here, it has been so far expanded that its unfavorable revenue effects outweigh the (perhaps reasonably) expected benefits, it should be reversed.

When the Metered Letter differential was instituted in Docket R2013-10, it did not exceed the cost difference between Stamped and Metered Letters. Now it is (at least)[15] one-and-a-half times that difference. From the perspective of 2013, it may have seemed that the spread between the differential and the cost difference would benefit

[14] For example, once carrier route presortation for First-Class Automation letters became unproductive, because of the advent of delivery point sequencing, the Postal Service proposed to do away with the discount for it, and the Commission agreed. See PRC Op. R2006-1, ¶¶ 5176-5179.

[15] That comparison uses only volume variable processing cost as a comparator. Depending on what other (estimated) cost elements are used, the differential could be as much as 5.8 times the cost difference.

the Postal Service – arguably a "rational" business prospect. That prospect has now disappeared, since the spread is now negative for the Service. And the differential, at $0.05, is now five times what it was when first established.

When the differential was initiated, it may have appeared that it would increase Metered volume. Nothing in published volume results shows that that has happened, and what we do know strongly suggests that it has not.

The possibility that meter-using mailers are receiving a five-cent price advantage for doing what they were doing before the price incentive was created is still a realistic one.

These are compelling reasons to reject the argument that because the original basis of the Metered Letter differential was "rational" (if indeed it was) it may not now be challenged – after a fivefold increase, making it exceed the cost difference, and an apparent failure to elicit more volume.

Section 403(c) and its interpretation. PB asserts (Motion, p. 16) that we have argued "that the only specific authorizations for price discrimination among similarly situated mailers are the non-profit and free-mail provisions of sections 3626 and 3403." This misrepresents the cited portion of the complaint (fn. 11 on p. 7). We were explaining the phrase "unless specifically authorized in this title" in the section prohibiting *undue or unreasonable* price discrimination. Like PB, we recognize that some price discriminations are neither undue nor unreasonable. And as the cited footnote expressly says, the generalized "pricing flexibility" objective is not the required *specific* authorization (unlike sections 3626 and 3403, which are).

PB also asserts that the complaint "ignores" the context of PAEA as a whole:

> . . . If, for example, all price differentials had to be strictly cost-justified under section 403(c), the express authorization of differential pricing in section 3622(b)(8)

would be superfluous, as indeed would be the worksharing provisions of section 3622(e).

This is an attack on a straw man. GCA argues that a differential substantially in excess of cost difference, as between two distinct groups of users of the same product, is for that reason among others an undue and reasonable discrimination. Differential pricing "within, between, or among classes of mail" (sec. 3622(b)(8)) is a vastly wider field than that of our complaint. It allows Presort rates to differ from Single-Piece rates; it allows one product to be raised one percent when another in the same class is raised three percent; it allows one product to bear a markup of 150 percent while another is marked up 75 percent – a relationship which, since it deals with institutional costs, by definition is not "cost-justified." Price differentials reflecting levels of worksharing under sec. 3622(e) are in principle, and doubtless mostly in practice, not differentials between similarly-situated mailers since each worksharing level requires a different commitment by the mailer. Hence they are not suitable targets for a sec. 403(c) complaint, and sec. 3622(e) is not relevant. In short, GCA is not arguing that "all price differentials" must be cost-justified: only that this one is not, and that for that reason as well as others it violates sec. 403(c).

IV. CONCLUSION

As noted at the outset, the Commission is required by sec. 3662(a) to entertain a complaint which raises material issues of law or fact. GCA's complaint does so. They include (without limitation):

- GCA believes that sec. 403(c) is a direct Congressional command, prohibiting the Postal Service from establishing an unduly or unreasonably discriminatory rate, and thus controlling vis-à-vis a claim of pricing flexibility under objective (b)(4).

- GCA also believes that a cost differential which exceeds the difference in cost (i.e., the potential saving for the Postal Service) between the letter sub-types by *at least* more than one-half is unreasonable.

- The Metered Letter differential, in GCA's view (supported by study of volume results), has not succeeded in attracting new volumes of Metered Letters, as was hoped for at the outset.

- If it were conceded that when the differential was instituted it had a "rational basis," it is still important to determine whether that basis no longer exists – with a differential five times as large as the original, one that now greatly exceeds the cost difference, and that has apparently not favorably influenced volume.

- Whether household and businesses are, as GCA believes, distinct groups on opposite sides of a rate discrimination, and at the same time similarly situated as users of like and contemporaneous service.

- How are Presort rates to be calculated once it is shown that the Metered Letter rate bears no relation to cost?

These are material issues. The Commission should recognize them as such and accordingly deny the motion to dismiss.

February 26, 2020

Respectfully submitted,

GREETING CARD ASSOCIATION

David F. Stover
2970 S. Columbus St., No. B1
Arlington, VA 22206-1450
(703) 998-2568 or (703) 395-1765
E-mail: postamp02@gmail.com

CERTIFICATE OF SERVICE

I certify that I have today served the foregoing pleading in a true and correct copy, via the Commission's Filing On Line system and by individually addressed electronic mail, upon

Michael F. Scanlon
John Longstreth
For Pitney Bowes Inc.
Michael.scanlon@klgates.com
john.longstreth@klgates.com

William B. Baker
For National Postal Policy Council
wbaker@potomaclaw.com

Amanda Hamilton
For the United States Postal Service
Amanda.J.Hamilton@usps.gov

David F. Stover

February 26, 2020